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ARE THE PEOPLE THEMSELVES A COURT OF LAST RESORT?

Several correspondents have called our attention to a serious interference with the course of justice in the Mooney case. The "appeal" to the "people" in this case has succeeded to the extent at least of securing a commutation of the death sentence to life imprisonment. Since that time another campaign has been put on foot to secure the pardon of Mr. Mooney.

We have no objections to commutations and pardons of persons convicted of crime. These powers of the governor are a proper safe-guard to the "accidents" that occur now and then in the administration of the criminal law. But what we seriously object to is the precedent of an appeal to the people from the court's decree.

It is well that the searchlight of publicity shall flood the court-room where a trial is going on. But when the case is given to the jury and the jury have returned their verdict it would destroy the dignity and influence of the courts to permit an appeal to try the case *de novo* in the court of public opinion.

If a pure democracy is better than a representative form of government, let us go back to the Grecian cities for our models and abolish legislatures and courts and summon the people from their daily pursuits into the public square, both to make and to construe the laws.

The failure of pure democracy as a form of government for a great nation is proven by the wrecks of such experiments strewn along the highway of history upon which the nations have emerged from barbarism to civilization. All these experiments have proven one thing and that is, that the representative form of government is as Jefferson has said, "the only form of government which is not eternally at open or secret war with the rights of mankind."

It is utterly impossible for the people to rule directly. They have neither the time nor the collective ability to do it. The operation of the axiom that what is everybody's business is nobody's business is so inexorable in its operation that every wild attempt at pure democracy soon develops a dictator or a tyrant to control or direct the popular fury. A bloody Marat or an ambitious Trotsky seizes the reins of government and the people drop back into submission. That nation is fortunate indeed where the people are quick to see the limitations upon the exercise of their right of sovereignty and confer the powers of government upon servants qualified to transact the duties assigned to them.

The administration of justice is one of the people's rights of sovereignty which they have transferred to judges to exercise for them. It is work of a kind that requires trained men to do it properly. As well might the people tell the chief surgeon of a city hospital how to perform a major operation as to interfere with a court in the transaction of its business. To outwit those who would defeat justice requires a man upon the bench skilled in the law and in the psychology of the court-room. To allow an appeal to the people from the judgment of such a court based on the finding of twelve good men and true is to undermine the work of the court. Such an appeal must necessarily be tried in the newspapers and in small public halls where superficial and prejudiced accounts of the trial are given and where passion is engendered and false suspicions aroused reflecting on the integrity of the attorneys, the jury and even the judge himself.

Moreover, in the Mooney case, the interposition of the Department of Labor in behalf of the defendant is also to be mentioned as a dangerous innovation. There can be no possible occasion, it seems to us,

for the interference of federal departmental officers with the judicial machinery of the states. Such interference should be promptly resented, as it encourages every man convicted by the courts of a state to appeal not only to the people at large through press agents and platform speakers, but to some federal official willing to intermeddle in the case for personal or political reasons.

As to the merits of the Mooney appeal we have no opinion. We have read much in favor of the convicted man that was plausible as evidence of the claim that he did not receive a fair trial and that his conviction was based on evidence, afterwards admitted by the one who gave it, to be false. But, bearing in mind the maxim, *audi alterem partem*, we have refused to come to any personal conclusion on the case, not being advised of the state's position. If all that is said in favor of Mr. Mooney be true, we are confident that the California authorities are ready and willing to avert the stigma of a judicial murder. But the responsibility is their and cannot be transferred to the people generally, and especially to people who are not citizens of California.

A. H. R.

"THE REIGN OF LAW."

On November 5, 1917, Honorable J. Murray Clark, K. C., delivered an address before the Royal Canadian Institute at Toronto, of which he is president, taking for his subject "The Reign of Law." It is now published in pamphlet form. It may be taken as the Canadian view of justice, admirably and conservatively expressed by high authority.

During the year 1918, President Wilson, using the identical phrase in one of his illuminating communications, gave expression to an acceptable measure of justice in the United States. The combination of the two viewpoints may not without reason be conveniently designated as the North American ideal of justice and its administration. It may be resorted to as pointing out the cause of many governmental troubles.

President Wilson's views are known of all men. Mr. Clark, while no stranger to the American Bar, needs some introduction to the American people. The object of the historic institution of which he is the honored head is to promote research and disseminate knowledge. The scope of its energies and its way of achievement, during the readjustment of the affairs of men now going on over the habitable globe, and to which the English and Canadians have been looking forward since the first year of the war, should be interesting. His thoughts are those of a practical lawyer and statesman.

Paraphrasing President Wilson's famous sentence, he lays down the premise that "Democracies must be made safe from demagogues." Thus the writer truly thrusts our attention upon the very root of successful government. He would cast out the devils of expediency and opportunity in order that fundamental principles may thrive. It is not difficult to deduce from this statement that the author is a student of Washington and of Adams and breathes their venerated spirit. "The Father of his Country," in his Farewell Address, warned his fellow countrymen against the plague of politics and politicians. It was his one source of pessimism. John Adams, in a letter to Jefferson, said that "parties and factions will not suffer or permit improvements to be made. * * * No sooner has one party discovered or invented an amelioration of the condition of man or the order of society than the opposite party belies it, misconstrues it, insults it and persecutes it." Said George Washington, "The common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and

restrain it. It serves only to distract the public counsels and enfeeble the public administration."

If the real advancement of Canada is often hindered by the selfish and unreasonable conduct of professional politicians in the Legislative Department of Government, Mr. Clark's address is a message of sympathy to America made by one qualified to extend it, and to a people of a mind to receive it.

But American and Canadian personal achievements in the past justly inspire optimism and faith in the future. There is no reason for fear or pessimism if men like the Royal Canadian Institute's great president shall persistently hold out the light of knowledge and fundamental principles to a patriotic though often misguided people. Canada and America do not have to go far back in history before merging into a common blood and common aim—that of the unconquerable Anglo-Saxon, — that has fought and suppressed every form of heresy that has cursed a gentle, civilized people. The time has already come when it is difficult to believe Macaulay's description of the post-Cromwellian period. They will have to wander a long way forward into strange fields in order to live their lives apart. There is no boundary between them save the sense of honor and gentility of gentlemen and gentlewomen. They need no other. And the friendship between them is even more than a social congeniality. It is a passion for higher and better things. It is a spiritual agreement as to the refinements of life, the principles of Government and the real spirit of liberty, however administered. So we live in each other's back yards without misunderstanding.

America may well profit by Canadian advancement as interpreted by her great institute. As our political troubles are not unlike why should not the fundamental principles of Government be similar? The American States adopted the profound common law of the Mother Country. For her judicial procedure the States continued the use of the common law pleading and have been unable to rid themselves entirely of it, though England commenced to do so in 1832 (Hilary Rules) and finally succeeded in 1872. (Selborne Act.)

But the practical thought in Mr. Clark's splendid address is yet to be stated. "Statecraft," said he, "must call science to its aid; for such evils can only be cured by the removal of their causes." Again, he goes directly to the root of legislative evils and announces the necessity for a sustained campaign of education. And, again, he breathes the spirit of the Founders of the American Government. Said Washington: "In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened." Conceding then the principle and its splendid promise, under the direction of the Royal Canadian Institute, one can justly hope for its application and that there will be an energetic resistance directed against those demagogues who ignorantly or wickedly assault the basic principles of representative government that are conditions precedent to the maintenance of peace, confidence, loyalty and liberty in both Canada and America.

It may not be untimely to suggest that both America and Canada need a recrudescence of the Pioneer spirit—the provincial veneration of truth, a spiritual passion for its observance, a hatred of expediency and hypocrisy and a will to identify it. That there were hypocrites and self seeking demagogues in Washington's time is a historical fact. That they failed to profit by their perfidy was doubtless due to the stress of conditions. Virtue was enabled to take root in society and was reflected in statesmanship. The present great war and its comcomitant militant spirit has served as a lamp to the feet of prosecuting officials, has given power to their endeavors

and has proved to be a maker of sentiment and a renewer of genuine patriotism. It furnished a measure for separating the wheat from the tares.

The whole habitable world is extending wistful looks to the American Continent for guidance during these days of enforced readjustment of social relations. Men are once again seeking the light. The devils of distrust and selfishness are taking neophytes to the mount of a newly acquired freedom and, granting them license instead of liberty, are placing into their hands the ordnance of destruction instead of the principle of preservation and are promising them the unearned fruits of the earth. What more beneficial work could be done by the Royal Canadian Institute than the transmission of these people in troubled lands of the doctrines of its learned, observant and philosophic President, as expressed in his address. "Democracies must be made safe from demagogues."

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

ATTACHMENT—IS PLAINTIFF IN ATTACHMENT LIABLE IN ACTION ON THE CASE WHERE HE ACTS WITHOUT MALICE.—The courts are divided on what seems to us a very simple question. Is an attachment plaintiff liable for failure to sustain the ground of attachment in the absence of malice? The Supreme Court of South Dakota, it seems to us, answers the question properly in the recent case of Slaughter v. Nolan, 169 N. W. 232, where it denies any right of action for wrongful attachment otherwise than on the bond.

What good reason can be given for the rule announced by the cases which hold that because a statute, in providing an extraordinary remedy, requires a bond, that therefore there could be an action for damages irrespective of the bond? Overton v. Mfg. Co., 50 Okla. 531, 151 Pac. 215.

Or what good reason can be given for the rule announced by the cases which hold that because attachment is an extraordinary remedy, the same rule should not apply as to ordinary actions and that therefore a plaintiff who mistakes his remedy or misconceives the strength of his evidence shall be liable irrespective of malice? Talbott v. Plaster Co., 151 Mo. App. 538, 132 S. W. 15.

The Kansas Supreme Court justifies this rule of liability on the ground that certain grounds *must* exist before the writ of attachment can issue. If they do not exist the writ has wrongfully issued. McLaughlin v. Davis, 14 Kans. 168.

As the Supreme Court of South Dakota says, "it is easy to see where such a line of reasoning would lead. A man has a right to bring an ordinary action only when certain facts do exist, not when there is probable cause to believe that they exist. Should we, therefore, say in relation to an ordinary action, what the Missouri court says of a wrongful attachment: 'The good faith of plaintiff is without effect in such cause.'"

It is the right of every man to start the machinery of the courts in motion whenever he pleases *on probable cause.* He is entitled to any form of writ which the law gives him and is liable only for abuse of process which necessarily presupposes malice or, which is the same thing, want of probable cause. This principle is clearly recognized in Stewart v. Sonneborn, 98 U. S. 187, where the Supreme Court of the United States held that an action for wrongful bankruptcy proceedings could not be sustained without showing that plaintiff was actuated by malice. In this case the court announced the general rule that "no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice or some improper or sinister motive."

Consult Vesper v. Crane Co., 165 Cal. 36, 130 Pac. 876; Mark v. Hyatt, 135 N. Y. 306, 18 L. R. A. 275; Storz v. Finkelstein, 48 Neb. 27, 66, N. Y. 1020.

EVIDENCE — PROOF OF PROFITS IN OTHER TRANSACTIONS TO PROVE SPECULATIVE DAMAGES UNDER A CONTRACT.—It is erroneous to say that under all circumstances speculative damages are not allowable. If by that term is meant uncer-

tainty as to profits arising from a given transaction, the rule must be modified to permit the recovery of such damages whenever by the express terms of their contract the parties contemplate that a breach will make either party liable to an amount that is as uncertain as the profits which are expected to be derived from the contract. Unless this be true there could be no recovery on contracts where by the very nature of them the damages are bound to be uncertain and speculative, as, for instance, contracts to share gross receipts.

It was the New York Court of Appeals which very clearly announced this rule in Wakeman v. Wheeler Wilson Mfg. Co., 101 N. Y. 205, and yet the New York Supreme Court (Appellate Division) is the latest appellate court to refuse to follow it. K. &. R. Film Co. v. Brady, 60 N. Y. L. J. 559. In the Brady case the defendant, who owned a theatre in Wilmington, Del., leased it to plaintiff, agreeing to divide the gross proceeds with plaintiff if plaintiff would show a certain moving picture in his theatre for one week. Defendant later refused to let plaintiff show his picture and made arrangement for a different attraction. The court recognizes that plaintiff's legal right has been violated and that an injury has resulted, but claims that the law is helpless to estimate the extent of the injury in such cases and that plaintiff by reason of such impossibility of furnishing proof, can recover only nominal damages.

The court recognizes that "in cases of this kind the loss of profits which the plaintiff would have made is the real measure of damages" but asks how it would be possible to introduce proof of such damages, which "would be at least sufficient to remove the question of the amount of profits from the realm of speculation to the realm of reason."

Plaintiff offered proof of the profits made in other theaters within a radius of 250 miles of defendant's theater. This the court refused to admit because conditions in other towns could not be said to be exactly similar to those in Wilmington.

This case, if it announces a correct rule of evidence, is an unfortunate confession of the impotence of the law to give a remedy for the infringement of a right where the right and the remedy are admitted to exist. Where the parties by express terms provide for the division of speculative profits as the consideration of a contract, it is clear that they contemplate speculative damages as resulting from a breach of it. That being true the best evidence of such profits would be the profits made in similar transactions as near as possible in point of time and place to the transaction in question.

If the photo play in the case cited had not been showed at any other theater, it might be very difficult to furnish any proof tending to show the gross receipts for one week at a first and only showing, but if the play had been shown at many other places under similar (not identical) conditions, such proof should go to the jury to enable them to calculate the damages each party to the contract had in mind at the time the contract was entered into as a probable result of the breach of it.

LIBEL AND SLANDER — WHETHER AN ATTORNEY'S STATEMENTS IN A PETITION TO THE GOVERNOR FOR PARDON ARE PRIVILEGED.—The Court of Appeals of New York had an interesting question to decide, in the case of Andrews v. Gardiner (Nov. 12, 1918, not yet reported). In this case the defendant, in a petition to the Governor of New York, for clemency in behalf of a physician convicted of improper practice, made a statement charging that the attorney for the medical society which prosecuted the physician was a blackmailer, had a personal grudge against the convicted physician and was a depraved scoundrel, who was employed by the medical society to get evidence and make cases against physicians of whom the society did not approve.

The attorney for the medical society immediately sued the attorney for defendant, who, in his defense, relied on the rule that the matter in such a petition was privileged. He even went so far as to say that the words used were not his own, but those of the convicted physician; that he expostulated with his client, but that the client insisted on the use of the words charged as constituting libel.

Two questions arose and were decided in this case. First: Were the words charged as constituting libel pertinent to the purpose of the petition for clemency, admitting that a

proceeding before the Governor for that purpose would afford protection to attorneys on the ground of privilege? * To this question the court anwered affirmatively, saying that no narrow test of relevancy or pertinency should be set up to hamper or restrict attorneys in their remarks.

The second point raised was: Is a proceeding before a governor, seeking clemency for a convict, a judicial proceeding, so that statements made by counsel in such proceeding are privileged? On this point the court held that such a proceeding was not a judicial proceeding nor similar thereto, and that there was no privilege enjoyed by counsel or his client in such proceeding, and that, therefore, if statements made in petitions of that kind, addressed to the Governor, were defamatory, attorneys are responsible. On this point the court said:

"The question, therefore, is whether absolute privilege ought now to be extended to an application for a pardon. It was so extended by the Court of Civil Appeals of Texas in Connellee v. Blanton (163 S. W. Rep., 404), but we think erroneously. Such an application is not a proceeding in court, nor one before an officer having 'attributes similar' to a court's (Royal Aquarium v. Parkinson, supra). It is a petition for mere grace and mercy. It may be made by anyone, and without the convict's knowledge. It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motive and arguments which are not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there is argument by counsel. As often the plea for mercy is made by wife or kin or friends. Whatever privilege belongs to counsel should belong also to them; the right to plead for clemency is not a monopoly of the Bar. Even if counsel speaks, his words are not spoken in office.' Nor are they subject to like restraints. At such a time anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion is stirred. The range of possible inquiry gives warning that the privilege should be confined within the limits of good faith. Where the test of the pertinent is so vague, there must be some check upon calumny. While convict and counsel act in good faith, they are immune; the privilege is lost when they defame with malice. There is no license under cover of such an occasion to publish charges known to be false or put forward for revenge."

A NEW FUNCTION FOR COURTS—DECLARING THE RIGHTS OF PARTIES.

In a recent opinion of the Supreme Court of the United States Justice Holmes makes this interesting observation:—

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun."[1]

Paraphrased, the statement comes to this:

In early times the basis of jurisdiction is the existence and the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential.

If this is true, it must be because there is something in civilization itself which diminishes the necessity for a resort to actual force in sustaining the judgments of courts. And it is quite clear that civilization does supply an element which is theoretically capable of entirely supplanting the exercise of force in the assertion of jurisdiction. This is respect for law. If the parties to the action desire to obey the law, a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the State in the faces of the litigants. The judgment of the court merely directs the will of the parties, and the performance of duty becomes the automatic consequence of the declaration of right.

It is not to be assumed that the peaceful acquiescence of the highly civilized man in the legal findings of the court implies any loss of power in the court itself. Quite the contrary. The greater the ease with which the court's findings impose themselves on litigants, the more the real power of the court is demonstrated. But the

(1) McDonald v. Mabee (Decided March 6, 1917), 37 Sup. Ct. Reporter 343.

force behind the finding of the court has become a latent instead of an active force. This transition is possible, however, only when the existence of the force is so well recognized and so clearly understood that no one would think it worth while to put it to the test. The entire cessation of actual coercive measures on the part of the court would therefore mark, not the disappearance, but the perfection of the rule of force.[2]

The modern observer, noting this correlation between social progress and the decline in the need for outward display of force in the administration of justice, may well ask himself why we have not done better than we appear to have done. If the existence of force is enough, without its exercise, to sustain the court in its findings, why do we not show a realization of that fact in our remedial machinery. If the power of the state stands irresistibly behind our judicial decisions, why take so much pains to clothe them with the outward show of authority? Why display the sheriff and his writ with so much ostentation? We do not arm our traffic policemen with guns and cutlasses. Why insist that the court must always rattle the sabre?

To make a specific application of this general criticism, let it be asked why our judicial system does not provide a means for merely determining and declaring rights. If our civilization is not a sham, and the state is understood to be equal to the task of enforcing the decrees of its courts, a mere declaration may serve every purpose of an order, and the order will become unnecessary. A declaration by the court that A is entitled to the immediate possession of a chattel in B's possession, should be equally effective in A's behalf as a judgment that A do have and recover of B the possession of the chattel. A judicial declaration that a certain city ordinance is invalid ought to serve equally as well as an injunction against its enforcement. Furthermore, the remedial possibilities in such declaratory judgments are much greater than in judgments for relief, and they open up an entirely new field for judicial usefulness, as will be hereinafter pointed out.

The answer to the question, why our courts do not make declarations of right, with or without relief, is probably historical, and lies in the philosophical conceptions of rights and remedies which have long been current in common law jurisprudence.

The common law was wedded to the idea of a wrongful act on somebody's part as a necessary condition precedent to judicial action.

Thus Holland, speaking of remedial rights, or rights of recourse of justice, says:—"The causes, or 'investitive facts,' of remedial rights are always infringements of antecedent rights * * * ".[3] And again, he says: 'So long as all goes well, the action of the law is dormant. When the balance of justice is disturbed by wrongdoing, or even by a threat of it, the law intervenes to restore, as far as possible, the *status quo ante*."[4] And in still further emphasis of this same characteristic of the court, as an *ex post facto* agency, he says:—"If all went smoothly, antecedent, or primary, rights would alone exist. Remedial, or sanctioning, rights are merely part of the machinery provided by the state for the redress of injury done to antecedent rights. This whole department of law is, in an especial sense 'added because of transgressions'."[5]

Salmond expresses the same view as to the function of courts and the conditions under which they may be used by litigants. He says:—"Both in civil and in criminal proceedings there is a *wrong* (actual or threatened) complained of. For the law

(2) Salmond, Jurisprudence, Ed. 4, p. 66.

(3) Jurisprudence, Ed. 9, p. 310.
(4) Jurisprudence, p. 306.
(5) Jurisprudence, p. 139.

will not enforce a right except as against a person who has already violated it, or who has at the least already shown an intention of doing so. Justice is administered only against wrongdoers, in act or in intent."[6]

Courts of equity operate upon the same theory of remedial justice as courts of law. Thus, injunctions are granted to restrain threatened wrongs, specific performance is decreed in case of breach of certain contracts, various remedies are available against those who are guilty of fraud or whose claims wrongfully rest on accident or mistake, an accounting may be had to test the accounts of those who are charged to have profited at the plaintiff's expense, titles are quieted against those wrongfully asserting rights hostile to the title of the plaintiff. In the case of bills for discovery, there is usually an action at law to which the bill is ancillary, and furthermore the party against whom the discovery is sought may be deemed to be wrongfully refusing to disclose. In all of these cases coercive relief is granted. A single exception serves only to make the rule more striking, and this is the administrative control exercised by courts of equity over trusts, permitting a resort by the trustee to the court to obtain a judicial construction of his powers and responsibilities under the terms of the trust instrument.

Proof of the accuracy of this summary of the attitude of courts of equity, in accordance with which they refuse to take jurisdiction of cases not calling for coercive relief, may be found in the express language of our courts. Thus in Woods v. Fuller,[7] the Supreme Court of Maryland said:—"A Court of equity will not take jurisdiction, unless it can afford immediate relief * * * It must be borne in mind that the *decree* of a Court of equity, and not its *opinion*, is the instrument through which it acts in granting relief. However sound and clear such *opinion* may be, as an abstract proposition of law, yet if the principle it declares cannot be carried into effect by a decree, in the case in which it is given, it is wholly valueless, and an idle and nugatory act."

In Greeley v. Nashua[8] the city of Nashua filed a bill to determine its rights to certain property devised to it under a will, and the Supreme Court of New Hampshire said:—"The plaintiffs * * * request the court to inform them what their legal rights and those of the defendants are in the property devised. The court might with equal propriety be called upon by the parties interested to advise them regarding the title to land, the construction of a contract, or any other question of law. Such questions are not ordinarily adjudicated until it becomes necessary to decide them in proceedings instituted for the redress of wrongs." The court then goes on to say that "they are prospectively determined by a court of equity in behalf of trustees who in the execution of the trust are entitled to its protection. Trustees are not required to incur risk in the management or distribution of the trust fund." Could anything be more quaintly suggestive of the ancient bigotry of the common law, when the judges hoarded their remedies as jealously as misers hoarded their gold? Protection must be saved for trustees, for if granted to others the supply might run short!

And in Bevans v. Bevans[9] a bill was filed to obtain the construction of a will with respect to the title to real estate. The Chancellor of New Jersey said:—" * * * It is settled that the court will not express opinions in regard to construction for the mere information of parties, disconnected from some equitable relief sought."

In accordance with this view of the defendant as an alleged wrongdoer, and the action as one founded upon his actual or

(6) Jurisprudence, p. 71.
(7) (1884) 61 Md. 457.
(8) (1882) 62 N. H. 166.
(9) (1905) 69 N. J. Eq. 1.

threatened wrong, it is quite true that a judgment for relief against him would always be appropriate, and would fully meet the situation. So the law reasoned, and so it ruled. If coercive relief *might* always be granted, it *ought* always to be granted, for why make a mere declaration of right against a wrongdoer who is before the court and subject to its power. Why merely tell him that he has no right to do as he proposes when the court can just as well prohibit the act. Why merely advise when it can as well command?

The United States has, in every department of its legal practice, accepted without question the foregoing theory of remedial justice. We have not allowed our developing civilization, with its constantly increasing respect for law, to produce any effect upon judicial functions. We refuse to allow parties to appear in court except under conditions which permit a display of force by the judicial arm of the state.

England has been much more enterprising. In 1852 parliament took the first step to abandon this archaic conception of remedial law. In that year an act was passed amending the practice of the High Court of Chancery, and one of the sections of that act provided as follows:—

"No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."[10]

This statute, while striking in its novelty, was subject to strict limitations. It applied only to Courts of Chancery, and it was construed to embrace only those cases where there was consequential relief which might be granted, but which the parties did not care to ask for or receive.[11]

But reforms moved swiftly in England. In 1873 the Judicature Act completely broke the shackles with which conventionality had burdened the administration of justice. And in the rejuvenation which the law experienced, all the limitations upon declaratory judgments which the old statute had retained, were swept away. The new rule was put into force in 1883, as Rule 5 of Order 25, and provided as follows:—

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and *the court may make binding declarations of right whether any consequential relief is or could be claimed or not.*"

This rule introduced "an innovation of a very important kind," to use the words of Justice Lindley.[12] It threw open to the court the right to do just what the Chancellor of New Jersey declared in Bevans v. Bevans (supra), that courts would never do, namely, "express opinions in regard to construction for the mere information of parties * * *."

Later, another rule was added which is probably to be deemed a mere specification of a class of cases originally embraced within the terms of the foregoing rule, which provided in express words that—

"In any division of the high court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

This was Order 54 A, Rule 1, passed in 1893.

For thirty-five years the English courts have exercised this jurisdiction, both at law and in equity, of advising parties as to their rights, with or without coercive relief at the option of the parties.

(10) 15 and 16 Vict., c. 86, s. 50.
(11) Rooke v. Kensington (1856), 2 K. & J. 753, 761.
(12) Ellis v. Duke of Bedford (1899), 1 Ch. 494, 515.

Now, two different classes of cases, based upon different principles, are presented by the present English rules.

1. We have first the cases where coercive relief might be had, but it is not desired. Here there is merely a new remedial right granted to the plaintiff. He has a cause of action of the conventional type, but he wants to use it for a new purpose. Instead of asking that the defendant be ordered to perform his contract, he only wants the court to assure him and inform the defendant that he has no right to performance. Instead of enjoining the defendant from taking certain action, he merely asks the court to advise him and the defendant whether the latter has a right to take it.

The advantages of asking advice instead of coercive relief are important. In the first place it presents in the pleading a specific and express issue of law, which can usually be answered yes or no, and which will settle the controversy between the parties. In this way the scope of the legal inquiry presented by the pleadings is clarified and limited. Furthermore, the issue of law is not one which must, as in case of a demurrer, be developed without any accompanying issue of fact. It is usually an issue of law to be decided upon the outcome of the trial or hearing, so that almost every case is capable of being presented as a case for advice. Thus a declaration of right may be asked as to a contract which plaintiff alleges contains certain provisions. If the defendant denies some of the terms alleged, the declaration of right will be based on the terms which the evidence substantiates. If one were inclined to question the advantage of this procedure in simplifying the issues, a glance through some of the current English reports would convince him of its effect. The question to be decided is always the correctness of the declaration asked, and the court has only to answer the specific questions thus put to it.

By asking for the declaration of right the party makes definite and certain the theory of his case, and the court is never at a loss to understand exactly what is in issue between the parties.

But there is another result which this procedure accomplishes in cases where coercive relief might be had, and that is a psychological one. Every case may by this means become, in appearance at least, a *friendly suit*. There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates. But if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the parties. To ask the court merely to say whether you have certain contract rights as against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war; the former assumes that both parties wish to do right, the latter is based on an accusation of wrong. A request for a declaration of right plainly implies full confidence that the defendant will promptly and voluntarily do his duty as soon as the court points it out to him. It indicates a willingness to rely on the defendant's sense of honor, as a sufficient remedy. It makes the lawsuit a co-operative proceeding, in which the court merely assists the parties to settle their own differences by stating to them the rules of law which govern them.

These considerations alone are enough to recommend the practice in any country where respect for the rights of others is

considered a virtue. The force behind the court is not at all weakened by it, for it appears that the plaintiff's confidence in the defendant's readiness to do right is misplaced, the coercive decree of the court is always ready to be promptly issued in support of its declaration.

2. An entirely different situation, however, is presented in those cases where no coercive relief can be granted. Here there is an entire absence of a cause of action in the conventional sense. Since the defendant has not yet done or threatened anything wrong, nor failed to do all that is lawfully incumbent upon him, there is nothing for the court to operate upon, if we accept the definitions of a cause of action set forth in an earlier portion of this article. If remedial rights arise only in support of primary rights infringed or threatened, there can be no remedial right of any kind in such cases.

To account for the right to a declaratory judgment in cases where no relief is possible, it seems necessary to boldly concede that the statute which authorizes it has created not a new remedy merely, but a new primary right. The old primary rights were the correlatives of duties calling for present action on the part of the defendant. These were infringed when the defendant failed to do what the law required. They were all based on a social system which considered justice as a by-product of force, and which saw no need for judicial administration concerning itself with any but wrongdoers. The common law never looked upon the courts as agencies useful for enabling parties to keep out of trouble. That was the business of the lawyers. It never admitted that any one had a legal right to know what his rights were.

The new rule authorizing declaratory judgments in cases where no relief is possible, gives one the right to know his rights. Since ignorance of the law excuses no one, the law will furnish an oracle to declare it. Assuming that parties intend to do right, it will point out the way they should go. To use a homely figure, prior to 1883 the English courts were employed only as repair shops; since that time they have been operated as service stations.

The field which the new rule opens is a wide and fruitful one, and by contrast makes the old practice, which is of course the current American practice, seem incredibly stupid. It furnishes remedies which no civilized country ought to deny to its citizens, and the lack of them is a serious hardship in this country.

The practice of making declarations of right has completely revolutionized English remedial law. The American lawyer who peruses the current English reports is bewildered by their novelty. He is like a modern Rip Van Winkle, who, having gone to sleep in an age when courts were only the nemesis of wrongdoers, awakens to find that they have become the guardians and advisers of those who respect the law.

The only recourse of an American who wishes to get a forecast of his rights is to consult his lawyer. But the lawyer's opinion is without the slightest binding force. Vast interests may be at stake, but all the client can do is to gamble on the sagacity of his counsel.

In England such compulsory gambling has been outgrown. The client consults his lawyer, the lawyer, in case of doubt, frames a case for the court, and the court, on a full hearing *with all interested parties before it*, makes a final and binding declaration on which the client can act with perfect security. The practice is so convenient and so obviously advantageous that it has become almost a matter of course in English chancery cases and is very common on the law side of the court. An examination of a recent volume of Chancery reports, volume 2 for 1916, shows that out of 64 cases reported, 43 were brought for declarations of right. It would be safe to

say that approximately two-thirds of the current Chancery litigation in the Supreme Court of Judicature is directed to obtaining the advice of the court as to rights of litigant parties, with or without prayers for consequential relief.

The cases in the volume of chancery reports above mentioned will illustrate the nature and range of questions put to the court for determination. Thus, in Lovesy v. Palmer,[13] plaintiff asked for a declaration that certain memoranda and letters constituted a binding contract between the defendants and the plaintiff to make a lease of a theatre. In Smith, Coney & Barrett v. Becker, Gray & Co.,[14] the plaintiff asked for declarations that certain contracts which they had made with defendants were illegal by reason of the proclamation of a state of war between Great Britain and Germany. In Re Lodwig[15] the plaintiff asked the court to declare whether certain trusts were void for remoteness. In Re New Chinese Antimony Co., Lim.,[16] the liquidator of a company asked the court to determine and declare the correlative rights of the preferred and common shareholders in the assets of the company. In Re Chafer and Randall's Contract[17] plaintiff asked a declaration that the abstract of title delivered by the defendant to the plaintiff did not show a good title. In Cassel v. Inglis[18] plaintiff asked the court to declare that he had been illegally excluded from membership in the Stock Exchange. In Coleman v. London County and Westminster Bank, Lim.,[19] the court was asked to decide the question of priorities in certain debentures as between the plaintiff and defendant. In Parsons v. Equitable Investment Co., Lim.,[20] the court was asked to declare that a certain bill of sale was void because it failed to truly state the consideration for which it was given. In Pearce v. Bulteel[21] a declaration was asked as to who were the owners of certain property. In Gilbert v. Gosport and Alverstoke Urban District Council[22] plaintiff asked the court to declare that he owned certain land free of any public right of way. In a majority of the above cases there was a present cause of action in the plaintiff, which was either utilized as the basis for a claim for relief in addition to the declaration of rights, or was abandoned in favor of the declaration as a better remedy.

The cases where a declaration of rights is the sole possible remedy are not easy to classify. Perhaps no logical classification is possible, for the whole matter of declaratory judgments is discretionary with the court, and each case seems to go on its own facts as an appeal to the exercise of that discretion. The scope of the applications for such declarations which the courts have approved, and the corresponding limitations upon the remedial possibilities in American practice, may be roughly shown under the following heads, merely as a means of convenient presentation.

1. A declaration of rights may be had where there is a present possibility of immediately creating a cause of action, as by a demand or refusal, but the parties have not done so, perhaps through reluctance to precipitate a conflict. This is the typical case for a friendly application to the court. It avoids the necessity of formal hostilities, such as American friendly suits require, and enables the parties to show on the face of the record that there has been a forbearance of any peremptory action. Thus, while an action on a contract, either for specific performance or damages, requires the allegation and proof of a breach by the defendant, a declaration of rights would seem to be available without any such allegation.

(13) (1916) 2 Ch. 233.
(14) (1916) 2 Ch. 86.
(15) (1916) 2 Ch. 26.
(16) (1916) 2 Ch. 115.
(17) (1916) 2 Ch. 8.
(18) (1916) 2 Ch. 211.
(19) (1916) 2 Ch. 353.
(20) (1916) 2 Ch. 527.
(21) (1916) 2 Ch. 544.
(22) (1916) 2 Ch. 587.

In Williams, Hollins & Co., Lim. v. Paget,[23] defendant was a manager employed by the plaintiff, under a salary and a contract for additional compensation. There were two possible methods of computing the additional compensation. The manager insisted on the higher, the employer on the lower basis of computation. Instead of creating a cause of action for damages by a demand on the part of the manager and a refusal on the part of the employer, the parties obtained a declaration from the court as to the true basis of computation.

In Rawlinson v. Mort[24] the court made a declaration that a certain organ, which had come rightfully into the possession of the defendants, was the property of the plaintiff, although no demand for it had ever been made upon the defendants.

In H. Newsum & Co., Lim., v. Bradley,[25] the plaintiffs were indorsees of bills of lading for the carriage of a cargo of wood in defendants steamship *Jupiter* from Archangel to Hull. The ship was torpedoed by a German submarine, and the crew were compelled by the enemy to leave her. Subsequently she was towed into a Scottish port by a British patrol boat, and the plaintiffs claimed the right to take possession of the goods without payment of freight. The parties agreed to allow the ship to proceed with her cargo to Hull subject to plaintiff's rights as of the date when she lay in the Scottish port, and this action was commenced for a declaration by the court as to what those rights were, no demand or refusal appearing to have been made. The declaration was given as asked by the plaintiffs.

An extremely large and varied class of cases of this kind arises out of the construction of written instruments, fixing the mutual rights of parties. Here present claims for relief might be created through action by one party hostile to the rights asserted by another party, but under Order 54A, Rule I, such a course is rendered entirely unnecessary. A doubt having arisen as to the meaning or effect of the instrument, this is enough to make it possible for any party concerned to present to the court the question upon which the doubt hinges.

A typical case is Cyclists' Touring Club v. Hopkinson,[26] where certain members of the plaintiff club desired to grant a pension to the club's secretary, who had filled that office for many years. A minority voted against the pension. The question was raised whether under the articles of association such action would be valid and this suit was brought solely to determine the question of power under the articles, no action having been taken nor threatened pursuant to the vote to grant the pension. The court declared that the granting of such a pension would not be *ultra vires*.

In Re Smith[27] the plaintiffs asked the court to declare that by virtue of a certain contract made by them with one Smith, in his lifetime, they were entitled to have Smith's executors execute to them a legal mortgage upon certain property belonging to the estate as security for certain advances. The declaration was made.

Similar instances might be indefinitely multiplied, but the principle underlying them is plain and seems to call for no further illustration. American practice limits bills for instructions to cases where there is some independent ground of equitable jurisdiction, such as trusts.[28]

2. Where one party only has a present right of action for legal or equitable relief, but the other will suffer a serious prejudice by delay in bringing it into court, the latter may have a declaration of rights.

Under American practice the courts can give the latter party no relief. He must helplessly wait until the party who has the cause of action chooses to sue him, even

(23) (1917) 86 L. J. Ch. 297.
(24) (1905) 93 L. T. 555.
(25) (1917) 86 L. J. K. B. 1238.
(26) (1906) 101 L. T. 848.
(27) (1916) 2 Ch. 206.
(28) I Whitehouse Equity, Sec. 129.

though the delay serves only to pile up the damages which he may eventually have to pay.

For example, suppose a patentee claims that a manufacturer is infringing his patent. The patentee has a cause of action of the conventional type, but the manufacturer has not. The patentee can sue the manufacturer, but the latter cannot sue him. The manufacturer may have a large investment in the machinery for making the disputed device, and may have spent large sums in advertising it. Upon the patentee's assertion of patent rights, the manufacturer must either discard his machinery, abandon his investment, and lose the good-will he has built up, or continue to operate under the constant threat of an action for damages whenever the patentee thinks that sufficiently large damages have accrued to make a law suit a profitable venture. If a declaration of rights could be had, the manufacturer could at once apply for a determination of the validity of the asserted patent, and thus save himself from the risk of serious loss and injury.

Such was the case presented in North Eastern Marine Engineering Co. v. Leeds Forge Co.,[29] where defendants claimed that plaintiffs were infringing their patents. Plaintiffs asked for a declaration that defendants' patents were invalid and that plaintiffs had not invaded any of the dedenfants' legal rights. Had the Patents and Trade-marks Act not offered an adequate remedy in just such a case—a remedy which the American patent law does not give[30]—the court would have given the declaration.

Another common instance of such a situation occurs where one makes separate contracts with two other parties, and one or each of the latter claims that his contract is broken by the contract with the other, as where two jobbers each claim exclusive rights in the same territory under separate contracts with the manufacturer. Here the manufacturer has no present cause of action for relief, and can only wait until sued by one or both of the jobbers. This situation is always possible where contemporary contracts are made with different persons respecting the same subject matter. Provision for declarations of rights would offer a satisfactory solution and would merely put into force the equitable rule of mutuality of remedy.

3. Where the plaintiff has no ground for relief but there is a probability, though not a threat, that the defendant may assert rights hostile to him, a declaration of rights may be had.[31]

4. Where a cause of action for relief is in a condition which might be called inchoate, and lapse of time is necessary to perfect it, the court will declare the rights of the parties, as in Austin v. Collins,[32] where a forfeiture of a life estate was to result unless a certain condition should be performed within a year, and the tenant got a declaration before the year was out that impossibility of performance would excuse the failure to perform the condition, or in West v. Lord Sackville,[33] where a remainderman got a declaration as to his title prior to the death of the life tenant, or in Powell & Thomas v. Evans Jones & Co.,[34] where a judgment was given for certain money received and a declaration respecting such further sums as might subsequently be received.

5. When the plaintiff has and can have no cause of action for relief, but his dealings with third persons depend on the determination of questions arising between himself and the defendant, a declaration of rights will be made.

In Jenkins v. Price,[35] the lessee of a hotel wished to assign her lease, but under its

(29) (1906) 1 Ch. 324.
(30) The remedy offered under American practice is limited to a finding upon conflicting patents. U. S. R. S., Sec. 4918.
(31) Hopkinson v. Mortimer, Harley & Co., (1917) 86 L. J. Ch. 467.
(32) (1886) 54 L. T. 903.
(33) (1903) 2 Ch. 378.
(34) (1905) 1 K. B. 11.
(35) (1907) 2 Ch. 229.

terms could not do so without the lessor's consent, unless such consent was unreasonably refused. The lessor refused. The lessee, in order to place herself in a position where she could deal with her proposed assignee, asked for a declaration that the refusal was unreasonable and released her from the restriction against assignment. This declaration was given.

Lord Justice Vaughan Williams, in a similar case[36] used very strong language in support of the practice, saying:—" * * * It seems to me that it would be quite shocking if the Court could not put an end to the dispute in the way the learned judge has done by this order. I mean it would be quite shocking if * * * the Court were bound to say, 'Although we have the whole matter before us * * * we must leave matters in this state, that the landlord may continue to abstain from granting his license and the tenant must assign at his own risk—that is, at the risk of forfeiture.'"

A similar situation arises in case of attempted sales of property in which others claim rights. The prospective purchaser does not care to buy a lawsuit, and only by a declaration of right against the claimant can the title be made merchantable in cases where a bill to quiet title would not lie.

Thus, in Re Burroughs-Fowler,[37] a trustee in bankruptcy offered property for sale, but the prospective purchaser objected that the title was defective. The trustee thereupon applied for a declaration that he was able to convey a good title, and the court so declared.

In Re Trafford's Settled Estates[38] the applicant wished to sell certain lands which he acquired under a will, freed from certain annuities which were created by the same will. He could do so only if he was a person having the powers of a tenant for life and asked for a declaration that he had such powers. The court decided the question so presented.

6. Where there is no present cause of action in the ordinary sense but the accrual of such a cause of action will subject the plaintiff to the risk of penalties, the court will declare the rights of the parties.

In such a case the plaintiff is not required to incur the risk of the penalties, but may obtain a declaration to inform himself of his rights in anticipation of penal liability. The question was thoroughly argued in a number of cases involving the inquisitorial powers of crown officers, and the judges all agreed that the anticipatory declaration of rights was an eminently suitable remedy.

Thus, in Burghes v. Attorney-General[39] the Commissioners of internal revenue had required plaintiff to make certain returns respecting rents paid out or received, for the purpose of fixing duties on land values. The plaintiff asked the court for a declaration that he was not bound to give the information demanded. Warrington, J., said:

"The complaint is that officers of the Crown are demanding information they are not entitled to, and, to say the least of it, reminding the subject of unpleasant consequences which may ensue if it is refused. It seems to me immaterial whether the terms of the notice amount to an actual threat: the reference to the penalty is plainly intended to intimate to the plaintiff that compliance can, and will, be compelled if necessary. If the question be not decided in this way it must be left open until the plaintiff, having refused to comply, is sued for penalties, and the plaintiff would be left in a position of great perplexity. In my opinion, the mode adopted by the plaintiff for obtaining a decision is a very convenient one, enabling the Commissioners to be informed how far they may go, and relieving the plaintiff from the doubt and perplexity into which he has been cast."

Another action of the same kind was brought in the King's Bench Division, and the Court of Appeal took the same view as Warrington, J., in the Burghes case. This was Dyson v. Attorney-General,[40] in which

(36) Young v. Ashley Gardens Properties, Lim. (1903) 2 Ch. 112.
(37) (1916) 2 Ch. 251.
(38) (1915) 1 Ch. 9.
(39) (1911) 2 Ch. 139, 155.
(40) (1911) 1 K. B. 410, 421 ff.

Farwell, L. J., speaking in the Court of Appeal, said:—

"It is obviously a question of the greatest importance; more than eight millions of Form IV [the form on which the information was required to be given] have been sent out in England, and the questions asked entail much trouble and in many cases considerable expense in answering; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty * * *."

The latest case of this kind is Ertel Bieber & Co. v. Rio Tinto Co.[41] The Rio Tinto Co., an English company, owned large mines in Spain, and was under contract to sell to the plaintiffs, which were German companies doing business in England, several million tons of ore over a period of four years, for delivery at various continental ports. The question arose whether these contracts were abrogated by the British Trading with the Enemy Act. Under our practice the Rio Tinto Co. would have been faced with the dilemma of going ahead with the contracts and taking the risk of incurring penalties under the Act, or stopping performance and laying itself open to actions for large damages. What it did was to commence an action for a declaration that it was no longer bound by the contracts, and the declaration was promptly made by the court.

7. Where plaintiff as a strict matter of law, has a right to an injunction, yet on account of the peculiar facts of the case the court may prefer to substitute a declaration of right as a more suitable remedy.

In Vestry of St. Mary, Islington v. Hornsey Urban District Council,[42] the plaintiffs, a metropolitan vestry, agreed to allow defendants, a district outside the metropolitan area, to discharge their sewage into plaintiffs' sewer, but after many years operation it was found that this additional sewage periodically stopped up plaintiffs' sewer. The agreement was *ultra vires* and void. The plaintiffs sought an injunction to restrain defendants from discharging sewage into plaintiffs' sewers. It was held that while the court had power to grant the injunction, yet, in view of the difficulty in which it would place defendants if obliged to close sewers in daily use, the Court would only make a declaration establishing plaintiffs' right to relief, to give defendants time to make other arrangements, with leave to apply for an injunction after the expiration of a reasonable time.

8. Where relief can only be granted in a foreign jurisdiction, the respective rights of the parties may be fixed by a declaration as an aid to the foreign adjudication.

In The Manar,[43] the plaintiffs were mortgagees of the British ship Manar, and on default in payment of the mortgage they had taken possession and chartered the ship for a voyage to France. On arrival there the defendants, Strachan Brothers, British subjects, arrested the ship and freight, claiming as creditors of the mortgagors for necessaries furnished to the ship. It appeared to be in dispute whether the French court would apply the English law in determining whether the plaintiffs as mortgagees or the defendants as necessaries men were entitled to the possession of the ship and freight. The plaintiffs asked for a declaration that they were entitled to the ship and freight as against defendants. It was held that since it was not clear from the evidence what effect a judgment in this action would have in France, and since it had not been shown that the declaration sought would not be of practical utility to plaintiffs in the French Court, the declaration would be given.

I want to emphasize two points in connection with this practice.

First. It does not contemplate the hearing of moot or abstract cases by the

(41) (1918) H. L. 260.
(42) (1900) 1 Ch. 695.
(43) (1903) P. 95.

courts. In every case there is an actual controversy between parties who urge conflicting claims.

Second. It has nothing in common with the practice provided for in a few states, whereby the executive or legislative department of the state may call upon the Supreme Court for its opinion upon important questions of law, or whereby the court may render judgment in advance upon such questions as the legality of a municipal bond issue. The difficulty with that procedure is that the court does not have the benefit of argument by interested parties, nor is it able to gauge the effect of a decision disassociated from the saving restrictions of a concrete case. The declaratory judgment is always the result of an actually litigated concrete controversy between parties who represent every interest involved and are actually before the court.

It seems quite evident that England has far surpassed this country in devising remedial methods calculated to make the courts useful and available under the exacting requirements of modern civilization. We have canonized the ancient tradition of a cause of action, in all its original crudeness, and have made it the condition and the measure of judicial action. We have failed utterly to see the enormous and far-reaching possibilities in preventive relief,—prevention not merely of threatened wrongs but prevention of uncertainty and misunderstanding in the assertion of rights. Yet here is an effective, workable system, tried out under conditions identical with those in our own country, which marks an advance over previous doctrines comparable to the great reform which equity made over the harsh rules of the common law. Its use would entail no reconstruction of our judicial machinery, no readjustment of other elements in our remedial system.

I am inclined to think that the Supreme Court of the United States has recognized the principle of the declaratory judgment in several recent cases. Thus, in Brushaber v. Union Pacific R. R. Co.,[44] an action was brought by a stockholder against the corporation to enjoin the payment of taxes. The real defendant was the United States Government, but it was not formally made a party and no relief was asked against it. However, the government actually appeared in the guise of an *amicus curiae* and took part in the suit, under the tacit understanding that the decision of the question involved would be considered as fixing the rights of the government in the premises. Another case very much like this is Corbus v. Gold Mining Co.[45] In both cases the relief asked was a mere formality, and in view of Section 3224 of the United States Revised Statutes, forbidding any suit for the purpose of restraining the collection of any tax, it would seem that a decree for relief would have been wholly ineffectual, the determination and declaration of rights was the real object of each suit, and so far as the government was concerned the judgment was a declaratory judgment.

The theory and operation of the English rules respecting the declaration of rights are perfectly simple. By adopting the language of the English rules, Order 25, Rule 5, authorizing declarations of rights, and the supplementary, though possibly unnecessary, rule, Order 54A, Rule 1, authorizing the judicial construction of documents, we might enjoy the fruits of England's experience, enriched as it is by the thirty-five years' labor which her courts have devoted to charting the waters over which the applicant for a declaratory judgment must sail.*

EDSON R. SUNDERLAND.
Ann Arbor, Mich.

(44) 240 U. S. 10.
(45) 187 U. S. 459.

***The foregoing article is the author's revision of an address delivered at the meeting of the Michigan State Bar Association, held at Kalamazoo, Michigan, June 28 and 29, 1918, which aroused much interest. It is worthy of careful thought and should provoke a discussion of what will probably be the next important reform in the administration of justice in this country.**

NEGLIGENCE—INHERENT DANGER.

97 S. E. 27.

GRANT v. GRAHAM CHERO-COLA BOTTLING CO.

(Supreme Court of North Carolina. Oct. 23, 1918.)

Carbonated ginger ale bottler's duty to public and dealers handling its bottles is not measured by the methods of other bottlers of carbonated drinks, but requires the bottler to exercise such care in charging the ginger ale that there is no danger from explosion in handling the bottles in the usual and customary way.

This was an action for damages sustained from an injury causing the loss of an eye. The plaintiff alleged that the defendant sold him bottles containing ginger ale, "which on account of the excessive pressure of gas, or by reason of some defect in the bottle, were dangerous as aforesaid, and likely to explode and to cause injury to any person handling them or being near them." The defendant's answer denied all negligence and averred that, in bottling the beverage sold to the plaintiff, it had used high class standard materials and bottles; that it had a standard up-to-date plant, equipped with modern machinery; and that it used tests and checks to the end that excessive pressure should not be used. It pleaded contributory negligence on the part of plaintiff, in that plaintiff negligently submitted the bottled beverage to sudden and violent changes of temperature, which caused and was likely to cause the explosion of any bottle containing the carbonated beverage. The evidence was that the plaintiff was a merchant, and having purchased a number of bottles of ginger ale from the defendant at its factory in Graham, N. C., had placed the same in the refrigerator in his store. Shortly thereafter, going to the refrigerator to get a bottle for a customer, upon lifting the top, and without touching any of the bottles, one of them burst; one of the pieces striking the plaintiff's left eye, destroying the same. There was evidence that defendant put up this and another carbonated beverage in his factory, and, both prior and subsequent to the plaintiff's injury, bottles had burst, injuring numerous other persons under similar circumstances. There was also evidence that these facts were known to the defendant, who also knew the manner in which the plaintiff used these bottles in his business, which was the usual and customary way in which merchants purchasing such merchandise used and handled it. The plaintiff complained that the defendant was negligent in bottling the beverage in such a manner that it was dangerous to handle and defendant had failed in his duty to plaintiff in selling him bottles which on account of the excessive pressure of gas, or by reason of some defects of the bottles, were dangerous to be near or to handle.

CLARK, C. J. We need not consider more than one exception, since that goes to the whole trial and, if erroneous, requires that the matter shall be again submitted to the jury under proper instructions. The court instructed the jury that, if they found that the defendant company used in its business appliances in approved and general use, with competent and sufficient workmen, and put in such drink only that quantity of gas pressure generally and at all times put in similar drinks by reasonably prudent and careful bottlers putting up such drinks, and also used that degree of care in selecting and inspecting the bottles in question and in having them filled and closed that would have been used by a man of reasonable care and prudence, and in putting up such drink from start to finish used that degree of care and prudence that would have been used by a man of reasonable care and prudence in handling and preparing the said article, then the defendant would not be guilty of negligence. If the injury was caused under the circumstances referred to above, after the defendant had used that degree of prudence and care, then the injury to plaintiff would have resulted from an accident and would not have been caused by the negligence of the defendant company, and in that event the jury should answer the first issue, "No." This seems to have been the theory upon which the case was tried, and with some changes of verbiage is the subject of other exceptions. The change is so slight that it is not necessary to repeat the other charges excepted to. All these charges embody the same idea that the defendant is excused if it conducted its business in the same manner that other bottlers conducted theirs, although as a matter of fact all might be dangerous. They entirely fail to furnish any standard of the measure of duty required of a reasonable and prudent man under circumstances such as these. The practice of other bottlers is referred to as such standard; but those other bottlers were, on the evidence, careless and negligent, as well as the defendant, as shown by the numerous explosions of their goods.

(1) The plaintiff's counsel contend that the defendant's duty to the plaintiff and to the

public cannot be measured by any such consideration; that the defendant owed to him the duty not to put into his hands as its customer a bottle charged with gas to that extent that it was dangerous to handle in the usual and customary method. The point is well taken. There is no evidence of what a prudent and reasonable man would do in bottling such explosive material. The evidence that other plants put up bottles of such beverages, which frequently exploded in like manner during the bottling, during transportation, and in the hands of customers, was not evidence that they were reasonable and prudent men, but, on the contrary, that they were as careless and negligent in their duty to the public and to their customers as this defendant. It does not exonerate this defendant that other establishments were careless and negligent. It is very certain that these establishments are not discharging their duty to the public and to their customers in putting out goods so prepared and bottled that there are numerous explosions liable to cause injury at any time, and which not infrequently have done so, as in Dail v. Taylor, 151 N. C. 287, 66 S. E. 135, 28 L. R. A. (N. S.) 949, and Cashwell v. Bottling Works, 174 N. C. 324, 93 S. E. 901.

(2) If the charge of the court were correct, it would license the defendant and other dealers in these highly charged carbonated drinks to place upon the market highly dangerous merchandise liable to explode and cause injury, such as the loss of plaintiff's eye, to all who handle these goods in the ordinary course of business without any liability on the part of the manufacturers. The manufacturer is liable even to the final purchaser, though there were no contractual dealings between them. Waters-Pierce Co. v. Deselms, 212 U. S. 159, 178, 179, 29 Sup. Ct. 270, 53 L. Ed. 453; Wellington v. Downer Co., 104 Mass. 64; Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932.

(3) It is not incumbent upon the plaintiff to show what precautions the defendant should take; that duty devolved upon the defendant, who was liable for negligence in putting such dangerous goods upon the market without sufficient precaution to make them safe. It may be that the defendant could have used wicker covering for the bottles such as is used for champagne bottles, or wire mesh cases as is used for certain goods of explosive nature. These would not prevent explosions, but would prevent the fragments of the glass doing much damage. Or the goods might be packed in sawdust, as is done with some goods such as aerated water liable to explosion. Or there might be some harmless ingredient put in the decoction to prevent sudden expansion causing explosions—a device that is not unusual. Or thicker bottles might be used, or there may be still other devices in this age in which "men have sought out many inventions." Ecclesiastes, c. vii, v. 28. But what is the best protection is one which the defendant must ascertain and use. It is certainly no defense for the defendant, who has placed dangerous and highly explosive merchandise upon the market which it knows has often exploded to the injury of its customers and others, to claim that other vendors and manufacturers in their pursuit of gain have been as indifferent to the safety of their customers and the public as the defendant itself.

"Safety first" for the public—if these goods are so inherently dangerous from their frequent explosion and liability to cause damage, as by putting out the eye of the plaintiff, that they cannot be made safe, then placing them upon the market is indictable, as well as makes the manufacturers and all vendors liable to actions for any damage accruing. Ward v. Sea Food Co., 171 N. C. 33, 87 S. E. 958.

Error.

NOTE.—*Liability of Manufacturer of Carbonated Bottled Beverage for Injury to Third Person.*—The instant case is where one in direct privity with a manufacturer was injured by the explosion of an aerated beverage, but the principle upon which it was decided applies to whomsoever suffers injury from an article inherently dangerous being put upon the market for sale.

In Willey v. Wynderse, 151 N. Y. Supp. 280, 165 App. Div 620, there was reversal of nonsuit in a case where personal injury was sustained by a bartender, a customer of defendant, from the bursting of a beverage highly charged with gas, exerting great pressure, contained in a second-hand bottle defective in its make. The court said: "The bursting of a bottle was *prima facie* evidence of negligence. It is for the jury to say, where the manufacturer puts into a bottle a highly charged gas so that it exerts a pressure of sixty pounds to the square inch, whether he is not bound to make suitable tests of the strength of the bottle."

In Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, the facts show that a siphon bottle of aerated water put on the market exploded and injured the servant of a customer of defendant manufacturer of the water. The court speaks of the absence of all contract relation between plaintiff and defendant and holds that the proof by defendant was "insufficient to establish that the bottles would not explode when used as customers might be expected to use them. The defendant might reasonably be held chargeable with knowledge that it was customary, especially in hot weather, to place siphons charged with aerated water in contact with ice; and, in view of this fact, a jury might well find that the tests applied to such bottles

should be such as to render it tolerably certain that they would not explode when thus used. The expert evidence actually employed by the defendant was not adequate to justify such a conclusion."

This goes to show that it is not necessarily sufficient to show what is the practice in approved testing, but that testing should go further, if it does not cover all ways to which the product may be subjected, in ordinary or expected use of the product. In that case there was no proof of any defect in the siphon itself.

In O'Neill v. James, 138 Mich. 567, 101 N. W. 828, 68 L. R. A. 348, 110 Am. St. Rep. 321, 5 Ann. & E. Ann. Cas. 177, there was a sale of champagne cider, and this was placed in an ice box. A servant of a dealer was injured by a bottle exploding, while he was in the act of removing it from the ice box. Judgment in his favor was reversed, because the testimony did not show that the explosion could not have occurred, if the bottles had been charged in the usual way, and defendant showed it was properly charged and the explosion might have otherwise occurred. This was said to remit the question to the jury. The court said that: "Where no contractual relation exists, the doctrine is recognized that there must be knowledge of the dangerous character of the thing sold, before defendant can be held liable." We doubt, however, that this rule applied in that case.

In Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932, it was held generally, that where one knowingly delivers and sells to another an article intrinsically dangerous to human life or health, such as a poison, explosive or the like, and the purchaser is without notice that it is intrinsically dangerous and is injured thereby, he may be held liable without regard to any priority of contract. The principle was applied to a sale of champagne cider not properly charged with carbonic gas. It seems clear that proper charging means in a bottle properly tested and of sufficient strength to hold the contents which it contains. It would be entirely proper to sell a non-charged beverage in one kind of bottle, and to place a highly charged beverage in the same bottle gives it the potency of danger, the same as if the beverage sold contained poison or other substance dangerous to life or health. It seems to me there is little if any difference in the rule as to container or contents being dangerous, if the former from being defective imports danger in the use of the latter. C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE OKLAHOMA STATE BAR ASSOCIATION.

The Oklahoma State Bar Association meets this year at Oklahoma City, January 15 and 16, 1919.

According to the program just sent us Mr. Ed S. Vaught, of Oklahoma City, will welcome the members, and Judge B. L. Tisinger, of Mangum, will respond, after which the President, Mr. E. G. McAdams, of Oklahoma City, will deliver the President's Address. Reports of committees will close the morning session. In the afternoon two papers will be read: one by Dean J. C. Monett, of Norman, on the "Soldiers' and Sailors' Relief Act;" and another by Mr. Strudell, of St. Louis, on the "War Risk Act, Including Allotments and Allowances."

On Thursday morning the annual address will be given by Hon. Geo. T. Page, President of the American Bar Association. His subject will be "First Line Trenches in Oklahoma." At this session a paper will also be read by Mr. Harry Smith, entitled "Federal Income Tax Act." At the afternoon session Mr. John H. Mosier, of Tulsa, will read a paper entitled "Commercial Arbitration." This will be followed by the election of officers, and in the evening by the usual annual banquet.

HUMOR OF THE LAW.

Aged Criminal (who has just got a life sentence): Oh, yer honor, I shall never live to do it.

Judge (soothingly): Never mind! Do as much of it as you can.—Boston Transcript.

Judge—"What is the prisoner charged with, officer?"

Cop—"Assault and battery on his mother-in-law, your honor."

Judge—"Are you guilty or not guilty?"

Victim—"Guilty, your honor."

Judge—"I fine you $1.10."

Victim—"But why the extra ten cents, judge?"

Judge—"That's the war tax on amusements."—Trench and Camp.

Harry Levey, of the Universal Theater in New York, spent a day recently with his friend, Fred Seitz, who has a butcher shop at East Hampton, L. I. A small colored girl came in the shop and asked for a ham she had left there to be smoked.

"I told you when you left it to come back in 30 days," said Seitz. "You're too early."

"No, I ain't," replied the girl. "I'm right on time, 'cause my pop got 30 days fer stealing that ham the day I brung it here. He came out this mawnin' and asked where it was."—St. Louis Post-Dispatch.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Attorney of Record.—Where attorney was dismissed before suit, his unauthorized signing of his name to the petition, in action brought by other attorneys, did not make him an attorney of record or add to his rights in regard to an attorney's lien.—Rawlings v. Louisville & N. R. Co., Ky., 205 S. W. 681.

2. **Bankruptcy**—Novation.—In view of Bankruptcy Act, §§ 70a and 47a2, a trustee of a bankrupt corporation may maintain an action to recover assets of the corporation which have been unlawfully diverted, where necessary to liquidate claims of creditors of corporation.—Miley v. Heaney, Wis., 169 N. W. 64.

3.——Preference.—Where property comes into the possession of the bankruptcy court, it may sell the same free from liens, and award the lienholder a preferential payment, representing the proceeds of his lien; but such practice is of doubtful propriety, where the right to a lien is disputed.—In re North Star Ice & Coal Co., U. S. D. C., 252 Fed. 301.

4.——Recovery by Trustee.—Under Bankruptcy Act, § 70e, a trustee in bankruptcy may recover for the benefit of the estate property transferred in violation of the state law.—Irwin v. Maple, U. S. C. C. A. 252 Fed. 10.

5.——Traveling Salesmen.—Partners, who sold goods for the bankrupt on a commission basis, maintaining their own office and not being bound to devote any particular amount of their time to a sale of the bankrupt's property, are not "traveling salesmen," within Bankruptcy Act July 1, 1898, so as to be entitled to priority as such.—In re Kominers, U. S. D. C., 252 Fed. 183.

6. **Bills and Notes**—Forgery.—If renewal notes were forged, they did not operate as payment of original validly signed notes, and maker was indebted to payee bank in same amount whether renewal notes were forged or genuine.—Clark v. Young, Mass., 120 N. E. 397.

7. **Bridges**—Specifications. — Where neither specifications nor blue print plans indicated the depth of excavation for concrete foundation of the pier of a bridge, it was competent for the parties to the county bridge building contract to agree in regard thereto.—Oregonia Bridge Co. v. Floyd County, Ky., 205 S. W. 690.

8. **Cancellation of Instruments**—Foreclosure.—As all defenses in a foreclosure suit could have been urged against purchasers of nonnegotiable mortgage notes before maturity, with knowledge of outstanding equities between mortgagor and mortgagee, such purchasers in the mortgagor's action to cancel the mortgage and notes would stand in place of the mortgagee.—Crawfis v. Edwards, Brewster & Clover, Cal., 175 Pac. 410.

9. **Carriers of Passengers**—Abusive Language.—A statement by a railroad station agent, when closing a station: "You fellows will have to get out of here. I am going to lock up'—did not show any violence, or insulting or abusive language such as would warrant damages for mental anguish.—Davenport v. Chicago, M. & St. P. Ry. Co., Wash., 175 Pac. 298.

10. **Certiorari**—Reviewed by.—Review on certiorari is usualy limited to a mere inspection of record, to see whether judgment conforms therewith, or whether lower court exceeded its jurisdiction or abused its discretion, and generally the lower court's opinion is no part of record.—McCauley v. Imperial Woolen Co., Pa., 104 Atl. 617.

11. **Commerce**—Employes.—The foreman of a bridge gang, killed in a collision while riding on a gasoline car after unloading concrete tiles to be used in the future in replacing wooden culverts in a railroad track, was not engaged in "interstate commerce" within the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).—Morrison v. Chicago, M. & St. P. Ry. Co., Wash., 175 Pac. 325.

12. **Common Law**—Customs. — Whether the origin of a rule of the English common law of sales was general custom or statutory enactment, it was brought over by the founders of the American commonwealth, if it was unchanged at the time of their emigration.—Friend v. Childs Dining Hall Co., Mass., 120 N. E. 407.

13. **Conspiracy**—Espionage Act.—An indictment charging that defendants, in violation of Espionage Act June 15, 1917, conspired to urge and persuade persons subject to military discipline to disobey, etc., held sufficient; it not being necessary to aver all the means for carrying out the conspiracy.—United States v. Nearing, U. S. D. C., 252 F. 223.

14. **Constitutional Law**—Imprisonment for Debt.—A commitment for contempt for failure to pay a master's fee awarded by the court, made on application of the master, is not an "imprisonment for debt," but for refusal to obey the order of the court.—Cutting v. Van Fleet, U. S. C. C. A., 252 F. 100.

15. **Contracts**—Expectation. — Where lender, in negotiating contract, said he would "expect" to write half the fire insurance, the word "expect" was used in the secondary meaning, implying demand, and not anticipation.—Sillman v. Spokane Savings & Loan Soc., Wash., 175 Pac. 296.

16.——Restraint of Trade.—An agreement that, in consideration of $1,000, defendant physician and surgeon would relinquish his business to plaintiff and retire from practice in the county for a period of 10 years, was not unreasonable and oppressive in its restrictions, either as to time or area.—Rowe v. Toon, Iowa, 169 N. W. 38.

17.——Waiver.—If the promisee insists upon performance, he waives the right to sue upon the promisor's repudiation of the contract, especially where the promisor does not himself retract in season.—Landes v. Klopstock, U. S. C. C. A., 252 Fed. 89.

18. **Corporations**—Preferred Stock. — Holder of preferred stock, entitled to receive when and as declared a fixed annual cumulative dividend of 6 per cent. before any dividends on common stock, where a dividend of 54 per cent for current year and arrearages for nine years was declared on preferred stock, was entitled to restrain payment of declared equal dividend on common stock.—Englander v. Osborne, Pa., 104 Atl. 614.

19.——Secretary.—While a secretary ordinarily has no official authority to bind corporation, it may be found by his acts when it intrusts management of its business to him and his acts are in furtherance of its business.—Advance Rumely Thresher Co. v. Evans Metcalf Implement Co., Kan., 175 Pac. 392.

20.——Stockholder.—One who buys stock from a stockholder must be presumed to have knowledge of provisions of assignment of stock delivered to him by the seller.—Id. Wiley v. Heaney, Wis., 169 N. W. 64.

21. **Courts** — Jurisdictional Facts. — Where constitutional court of general jurisdiction has been given special statutory jurisdiction, and manner of exercise is pointed out, the record of such court must show jurisdictional facts. —Id. Wallace v. Hill, Ark., 205 S. W. 699.

22. **Criminal Law**—Variance.—A variance between the evidence and an unnecessary and immaterial allegation in an information charging a misdemeanor not prejudicial to defendants' rights will not compel a reversal of a conviction.—State v. Wright, Kan., 175 Pac. 381.

23. **Damages**—Minimizing.—A vessel injured and sunk in collision, which may be raised and repaired, can not be abandoned by the owner and treated as a loss; he must minimize damages.—Houchen v. Oregon-Washington R. & Nav. Co., Wash., 175 Pac. 316.

24.——Special Damages.—In action for personal injuries, expenses for medical treatment are "special damages", and must be pleaded and proved.—Louisville Ry. Co. v. Schwemmer, Ky., 205 S. W. 685.

25. **Descent and Distribution**—Expectancy.—The expectancy of an heir apparent is, during the life of his ancestor, a mere hope or anticipation.—In re Zimmerman's Will, N. Y., 172 N. Y. S. 80.

26. **Divorce**—Civil Contract.—Marriage is a civil contract between the parties, implying an obligation to support, in recognition of which alimony is allowed, which when liquidated by judgment is regarded as a debt by contract as well as by judgment.—Schooley v. Schooley, Iowa, 169 N. W. 56.

27.——Settlement of Property.—Settlement of property interests by the parties prior to action for divorce does not deprive the court of its authority under Rem. Code 1915, § 988, to make, and by attachment enforce, orders for the welfare of children, as payment for their support. —Miller v. Miller, Wash., 175 Pac. 295.

28. **Dower** — Contingent Estate. — Dower, though called an incumbrance, can not be otherwise than a contingent estate or interest, being contingent in that it may be extinguished by wife's death before husband, and in that its amount is uncertain and variable, depending on value of property at husband's death.—Kelly v. Minor, U. S. C. C. A., 252.

29. **Election of Remedies.**—Other Action.—The mere bringing of an action which has been dismissed before judgment, in which no advantage has been gained or legal detriment occasioned, is not an election.—Lewis v. Powell, Tex., 205 S. W. 737.

30.——Primary Law.—Direct Primary Law of June 16, 1913, §23, as amended in 1917, precluding a candidate who failed to receive the highest number of votes cast for a nomination by the party with which he was affiliated 35 days before election, as evidenced by his affidavit of registration, from being the nominee of another party, is constitutional under Const. art, 2, §2½, authorizing the Legislature to prescribe tests and conditions for candidates at primary election.—Heney v. Jordan, Cal., 175 Pac. 402.

31. **Eminent Domain**—Waiver.—Independently of waiver or estoppel, whatever right to damages in any form the owner of land in which easement was taken by defendant town for a sewer may have had, whether entry of the town was lawful or unlawful, was a case in action, which did not pass to grantee under owner's deed.—Howland v. Inhabitants of Greenfield, Mass., 120 N. E. 394.

32. **Estoppel**—State.—The state is not estopped by the unauthorized acts of its officers, but it is estopped by authorized acts of its officers to the extent of the power actually given them.—Wallace v. Hill, Ark., 205 S. W. 699.

33. **Food**—Sale for Consumption.—When one resorts to a tavern, inn, or eating place, for a consideration to be served with food for immediate consumption, and is received as a guest by the keeper, there is an implied duty to furnish food fit to eat.—Friend v. Childs Dining Hall Co., Mass., 120 N. E. 407.

34. **Forgery**—Intent.—Fraudulent intent is essential to constitute forgery.—Rickman v. State, Ark., 205 S. W. 711.

35. **Fraud**—Decoy Purchaser.—Where a decoy purchaser is made use of to corroborate or impress upon the prospective buyer a misrepresentation concerning the value of the property sold, or some other material fact, actionable fraud may result.—Miley v. Heaney, Wis., 169 N. W. 64.

36. **Gas**—Intervention.—Where gas company, under Pub. Laws 1912, v. 795, applied to Public Service Commission to fix rates, the city and town affected thereby, having intervened under rule 3 of the Public Utilities Commission, as authorized by section 17 of such act, had the right to appeal, notwithstanding section 34 limits the appeal to a "complainant."—Public Utilities Commission v. Providence Gas Co., R. I., 104 Atl. 609.

37. **Gifts**—Undue Influence.—The equity rule requiring a parent to prove that a gift from a

child was bona fide, free from force, duress, or undue influence, does not apply to land deeded to a mother by a daughter of lawful age who did not own the land but merely received it from her father under promise to deed to the mother.—Haldeman v. Weeks, Ore., 175 Pac. 445.

38. **Guardian and Ward**—Order of Sale.—Purchaser of realty at guardian's sale must pay purchase money into guardian's hands pursuant to order of sale, and can not make payment by paying guardian's personal obligations and deducting amount thereof from purchase price.—Harris v. Wilcox, Okla., 175 Pac. 352.

39. **Indictment and Information**—Bill of Particulars.—Where an indictment charged that defendants conspired to impede enlistment service by public speeches, private solicitation, and the publication of a magazine, held, that they were entitled to a bill of particulars of the speeches, etc., relied on.—United States v. Eastman, U. S. D. C., 252 Fed. 232.

40.——Information Defining Offense.—Unless a statute creating an offense so defines it that it can not be properly described without negativing an exception, an indictment for violation thereof need not negative the exception—United States v. Greenhaum, U. S. D. C., 252 Fed. 259.

41. **Injunction** — Contempt. — Persons amenable to an injunctional decree are subject to proceedings for contempt for its violation, without regard to the lapse of time since the decree, especially where the proceedings are criminal in character.—Tosh v. West Kentucky Coal Co., U. S. C. C. A., 252 Fed. 44.

42.——Preliminary. — Preliminary injunction should not issue, unless a reasonably clear case of necessity and otherwise irreparable injury is made out.—Louisville & N. R. Co. v. Western Union Telegraph Co., U. S. C. C. A., 252 Fed. 29.

43. **Insurance**—By-Laws.—Change in by-law relating to insurance of live stock and amount of risk by eliminating provision that liability should not exceed market value of animal lost held without effect on rights of parties in action on policy.—Brenn v. Farmers' Alliance Ins. Co., Kan., 175 Pac. 383.

44.——Imputable Knowledge.—Knowledge acquired by an association's medical examiner and local agent in the discharge of their duty in connection with the application, and in reporting it to insurer for its information before its final action on application, was to be imputed to insurer.—The Homesteaders v. Stapp, Tex., 205 S. W. 743.

45.——Mortgagee.—Where mortgagee in possession of livery barn insured it, and on its loss by fire received a draft payable to himself and the owner of the premises, the owner having redeemed, was entitled to recover the insurance collected and held by the mortgagee.—Thress v. Zempel, N. D., 169 N. W. 79.

46.——Removal of Goods.—In fire policies on personalty which from its character and ordinary use is kept continuously in one place, as merchandise, machinery in a building, household furniture, or stored goods, the location of the property is an essential element of the risk, usually a continuing warranty.—Lesh v. Rock Creek Tp. Farmers' Mut. Ins. Co., Ind., 120 N. E. 391.

47. **Landlord and Tenant**—Fire Escape.—Where landlord placed ladder from roof of one story extension to window of third story for use as a fire escape, and tenant's janitor while trying to teach tenant's rooms on third story, used ladder and was injured when it slipped, landlord was not liable as he owed no duty to make fire escape safe for such use; there being a stairway to third story.—Gillard v. Hoffman, Kan., 175 Pac. 395.

48.—Lien on Crops.—Where landlord, by express provision of lease, is given lien upon crops as security for rent, the lien is effectual, not only as regards the crops of the first year, but also as to those raised during subsequent years; the lien attaching when crop is planted.—La Grande Nat. Bank v. Oliver, Ore., 175 Pac. 434.

49. **Libel and Slander**—Intention.—That an honest mistake was made by a publisher in the use of plaintiff's name in connection with a libelous charge is not a legal excuse, as the law looks to consequences of publication rather than to publisher's intention.—Hatfield v. Gazette Printing Co., Kan., 175 Pac. 382.

50. **Limitation of Actions**—Curative Legislation.—Statutes of limitations are curative, and confer rights of property, which are as much entitled to protection as any other legal right.—Fogle v. Baker, Tex., 205 S. W. 752.

51.——Starting Point.—General rule is that statute of limitations begins to run from date of injury, and mere lack of knowledge of actionable wrong does not suspend it, nor does silence of wrongdoer, unless he has done something to prevent discovery; even concealment by him will not prevent running of statute, unless there is a good reason for injured person's failure to discover the wrong.—Harper v. Harper, U. S. C. C. A., 252 Fed. 39.

52. **Master and Servant**—Accidental Injury.—Stroke from direct rays of sun, heat stroke, or prostration are "accidental injuries," within Workmen's Compensation Act June 2, 1915 (P. L. 736); it being immaterial whether prostration results from artificial heat or from sun's natural heat, directly or through heated atmosphere, if exhaustion results from heat in course of employment.—Lane v. Horn & Hardart Baking Company, Pa., 104 Atl. 615.

53. Assumption of Risk.—Servant's assumption of risk included employer's negligence, if he knew of negligence and appreciated danger incident to service.—Athletic Mining & Smelting Co. v. Sharp, Ark., 205 S. W. 695.

54.——Inspection by Master.—A railroad is bound to inspect the cars of another railroad used on its road just as it would inspect its own cars, and owes such duty as master, and is responsible for the consequences of such defects as would be discovered by ordinary inspection.—Rowe v. Colorado & S. R. Co., Tex., 205 S. W. 731.

55.—Obvious Danger.—If the place of work is so obviously dangerous that a person of ordinary understanding and judgment, situated as the servant is, could by the exercise of ordinary care discover the danger in time to prevent injury, he can not recover.—Hazard Coal Co. v. Wallace, Ky., 205 S. W. 692.

56.——Proximate Cause.—Where logs being rolled down a hill were stopped by a stump, and lumber company employe, while dislodging the logs with cant hook, miscalculated the effect of his effort, and, failing to get out of the way of the logs, was injured, the stump, not having caused logs to strike employe, was not proximate cause of injury.—D. E. Hewitt Lumber Co. v. Cisco, Ky., 205 S. W. 677.

57.——Workmen's Compensation Act. — On claim under Workmen's Compensation Act June 2, 1915 (P. L. 736), for wool sorter's death from external anthrax, referee's findings that he received a scratch on his neck in the course of his employment, and that anthrax germs then entered his body, causing his death, justified conclusion that he died as result of injury by accident in course of his employment.—McCauley v. Imperial Woolen Co., Pa., 104 Atl. 617.

58. **Mortgages**—Jurisdiction.—In action to foreclosé mortgage, the court acquires jurisdiction of only so much of the subject-matter as is held by the parties before it.—Smith v. Pacific Improvement Co., N. Y., 172 N. Y. S. 65. ber 28th

59. **Municipal Corporations** — Negligence.—The city is not liable for damages from falling on steps on a sidewalk as part of an entrance to a building used as a post office, though they are out of repair, and though ice may have accumulated thereon.—Ellingson v. City of Leeds, N. D., 169 N. W. 85.

60. **Navigable Waters**—Floating Logs.—A stream capable in its natural state of floating sawlogs to market successfully is navigable for that purpose.—Guilliams v. Beaver Lake Club, Ore., 175 Pac. 437.

61. **Negligence**—Proximate Cause. — Where plaintiff's decedent, delivering coal at defendant company's place of business, was caught and fatally injured by revolving shafting in full view from where he was working, despite failure to warn of shafting, defendant was not liable.—Hunt v. Economic Machinery Co., Mass., 120 N. E. 416.

62. **Notice**—Efficacy of.—The rule of notice is that knowledge of facts which, if followed up, would disclose the true state of facts, is efficacious.—In re Scruggs Bros., U. S. D. C., 252 Fed. 322.

63. **Pardon**—Restoration to Rights.—A full pardon restores one to all his civil rights, and blots out the existence of guilt.—United States v. Commanding Officer of 78th Division, U. S. A., U. S. D. C., 252 Fed. 314.

64. **Partnership**—Adventure.—Where debts of partnership have been paid, its profits distributed, and its accounts closed, one partner may maintain action against another for a part of the profits from a venture, not involved in partnership accounting, without applying to court of equity for an additional accounting. —Dill v. Flesher, Okla., 175 Pac. 359.

65. **Railroads**—City Ordinance.—A person crossing a railroad track at a public crossing may rely on the presumption that the railroad will obey the city ordinances.—Cleveland, C. C. & St. L. Ry. Co. v. Sammons, Ind., 120 N. E. 389.

66. **Reformation of Instruments**—Equity.—Equity will reform a written contract, when by reason of mutual mistake of the parties it does not express their true agreement.—Stark v. Suttle, Ky., 205 S. W. 673.

67. **Sales**—Bidder at Sale.—Where contractor selling reinforced steel bid to furnish steel and plans for a patented system, and contracted not to furnish a definite quantity of steel, but all required, buyers could not avoid payment by setting up misrepresentations as to amount, 39 tons being necessary, while contract estimated it would be 50 tons.—Wheeler v. Pitwood, Wash., 175 Pac. 289.

68.——Condition Precedent.—Tender of dividends received by seller on stock sold by him to defendant, and by defendant pledged as security for purchase price, was not a condition precedent to suit to rescind for nonpayment of purchase price.—Atkins v. Garrett, U. S. D. C., 252 Fed. 280.

69.——Food.—Food for immediate use, which is not fit to eat, is not merchantable as food. —Friend v. Childs Dining Hall Co., Mass., 120 N. E. 407.

70.——Sale by Description.—Generally, where goods are sold by description, and the buyer has not had an opportunity of inspection, the goods must not only in fact answer the description, but must also be salable or merchantable under that description.—Rinelli v. Rubino, Ind., 120 N. E. 388.

71. **Shipping**—Charterer of Launch.—Where the owner of a gasoline launch charters it to another for the purchase and transportation of fish, he can not recover from the charterer for the loss of the launch, where the loss was occasioned by the negligence of his own servant who was in charge.—Boe v. Hodgson Graham Co., Wash., 175 Pac. 310.

72. **Specific Performance**—Exclusive License. —Where contract provides for giving by defendant of exclusive license to manufacture under a patent, and for plaintiff giving from time to time, as royalties increase, additional security, specific performance by defendant of the agreement should not be decreed, whereby the court assumes protracted supervision of its performance, but only the giving of the license should be ordered.—Life Preserver Suit Co. v. National Life Preserver Co., U. S. C. C. A., 252 Fed. 139.

73.——Penalty.—Where debtor defaulted payment of mortgage notes, and creditor exercised option, and declared whole principal and interest due, and collected both earned and unearned interest amounting to more than the legal interest on principal debt, he was liable for penalty under Rev. Laws 1910, § 1005, for taking usurious interest.—Ruby v. Warrior, Okla., 175 Pac. 355.

74. **Subrogation**—Equitable Right.—To entitle a person to invoke the equitable right of subrogation, he must either occupy the position of a surety or have made a payment under an agreement that he should hold and receive an assignment of the debt as security; and hence a stockholder, who advanced money to a corporation to enable it to discharge a mortgage, is not entitled to subrogation to the rights of the mortgagee.—Karasik v. People's Trust Co., U. S. D. C., 252 Fed. 324.

75. **Telegraphs and Telephones.**—Interference.—Where public telephone line contracted to maintain private wire along its poles, its removal thereof to a different series of pegs on the poles, if without substantial interference with the efficiency of the wire when properly connected, was entirely within its rights.—Anson v. Fobes, Iowa, 169 N. W. 35.

76. **Usury**—Law of Place of Contract.—Where notes and a mortgage were executed in Chicago, Ill., though dated at Portland, Ore., the controlling transactions being in Chicago and the notes being made payable there, where the trustee was a resident, the documents were Illinois contracts, controlled by Illinois law as to usury.—Brown v. Crawford, U. S. D. C., 252 Fed. 248.

77. **Vendor and Purchaser** — Estoppel.— Where wife, suing for divorce, impleaded husband's brother, to whom husband had transferred an interest in land, alleged to have been done with fraudulent purpose of defeating a charge on the land for alimony, suit money, and maintenance, the alimony decreed constituted a charge on the land, where the brother had not participated in fraud, to the extent of the purchase money brother owed when impleaded, at which time he was given notice of the charge on the land.—Gollehon v. Gollehon, Va., 96 S. E. 769.

78. **Waters and Water Courses.**—Boundary Lines.—Deed having named as boundary a swamp consisting of stream with margin of swamp, it may be shown that parties intended edge of swamp rather than stream as boundary, and, if that is made to appear, effect will be given intention.—Wheeler v. Wheeler, S. C., 96 S. E. 714.

79. **Wills**—Agreement to Devise.—A father's agreement that, if a son would sell out and remove to Kentucky, he would give him a farm, was satisfied by the father's devise of a farm of 70 acres, so that the son was not entitled to recover damages resulting from his sale and removal.—Brewer's Adm'r v. Brewer, Ky., 205 S. W. 393.

80.——Heirs.—The word "heirs" is a technical term, and is used to designate the persons who would by the statute succeed in the real estate, or, in California, estate of any kind, in case of intestacy.—In re Watts' Estate, Cal., 175 Pac. 415.

81.——Life Estate.—Where words in a will indicate an intention to limit the estate granted to the life of the devisee, and they fairly import that purpose, it must be assumed that testator intended to devise merely a life interest. —Southwick v. Southwick, Iowa, 168 N. W. 807.

82.——Limitation Over.—Where a life estate only is devised, and the life tenant given a power of disposition, a limitation over of such of the property as may remain undisposed of by him at his death, is valid.—Trustees Presbyterian Church, Somerset v. Mize, Ky., 205 S. W. 674.

83.——Residuary Clause.—Where, by residuary clause, testatrix gave to M. S. to hold in trust all residue of personalty, directing distribution to children of L. B. S. and M. S. "or their descendants," independently of Rev. St. c. 79, § 10, testatrix provided lineal descendants of child dying in her lifetime should take parent's share.—Strout v. Strout, Me., 104 Atl. 577.

84. **Witnesses**—Competency. — Conviction of a military offense by court-martial does not make a witness incompetent to testify in the civil courts in a criminal prosecution.—Reed v. United States, U. S. C. C. A., 252 Fed. 21.